No. 15,793

IN THE

United States Court of Appeals

For the Ninth Circuit

GERMAINE M. HAILI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

The District Court had jurisdiction of the trial of this case under 18 U.S.C. § 3232, and Rule 18, Federal Rules of Criminal Procedure. After conviction on Count II of two counts of the Indictment a timely appeal *in forma pauperis* was taken by the Defendant and the jurisdiction of this Court to review the Judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

Appellee agrees with Appellant's statement of the case as supplemented by the following:

(1) After indictment on May 13, 1957, a Motion for Bill of Particulars was filed by the Defendant on May 4, 1957. (R. 5.) A hearing was had on the Motion on June 6, 1957, and certain oral particulars were given, accepted by the Defendant, and made a part of the record (R. 7-9), to the effect that Count II of the Indictment was based upon the conditions of probation shown by the Court's judgment and orders therein and the testimony at the hearing on the revocation of probation of Harriet Bruce in Criminal No. 11,073 in the United States District Court for the District of Hawaii, and the acts complained of were those testified to by the Defendant and others at this hearing.

(2) Appellant at Page 4 of his Brief makes the following statement:

> "Based on the fact that appellant associated with the probationer when the probationer was directed not to do so, appellant was indicted for obstructing and impeding the due administration of justice."

It should be pointed out here that the particulars given and the proof at the trial showed that this so-called association of the Defendant with the Probationer involved the situation where Defendant was advised and so acknowledged that the Probationer was not to associate with him, but that in spite of that knowledge he: (1) continually forced his unwanted presence on the Probationer even to the extent of breaking into her apartment; (2) attempted to deceive her into believing that the Probation Officer was a friend of his

and that his association with her therefore would be condoned by the Probation Officer; and (3) threatened her repeatedly and beat her physically in order to convince her of the foregoing and to intimidate her sufficiently so that she would not report his associations with her to the Probation Officer.

The foregoing are uncontroverted facts made as judicial admissions by the Defendant (Plaintiff's Exhibit "1", R. 132-186.)

QUESTIONS PRESENTED.

This appeal presents two basic questions:

(1) Whether Count II of the Indictment taken together with the particulars thereto sufficiently alleges an offense under 18 U.S.C. § 1503.

(2) Whether Count II of the Indictment, supplemented by the particulars and borne out by the evidence, states and demonstrates an offense under 18 U.S.C. § 1503.

ARGUMENT.

I.

COUNT II OF THE INDICTMENT TAKEN TOGETHER WITH THE PARTICULARS THERETO SUFFICIENTLY ALLEGES AN OFFENSE UNDER 18 USC § 1503.

Count II of the Indictment reads as follows:

"The Grand Jury Further Charges:

"That commencing on or about October 10, 1956, up to and including March 8, 1957, in the City

> and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Germaine M. Haili, the identical person named in Count I of this Indictment, did corruptly, and by threats and force, influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice with respect to the terms and conditions of probation of one Harriet Elizabeth Bruce, also known as Honey Harlow, defendant in Criminal No. 11,073, United States District Court for the District of Hawaii, in violation of Section 1503, Title 18, United States Code." (R. 3.)

Appellant contends that the foregoing Count of the Indictment is fatally defective in that it fails to allege that Defendant had knowledge that justice was being administered, in other words, the element of *scienter.* In this respect Appellant relies primarily on *Pettibone v. U.S.,* 148 U.S. 197. It is felt that the *Pettibone* case is not a true test to be applied to an indictment under the present day rules of criminal pleading. The rigid requirements set forth in *Pettibone* with regard to pleading under this statute and in particular the requirement set forth that the indictment allege that the defendant must have known that "the particular justice was there being administered" have been distinguished many times since. See *Anderson v. U.S.,* 6 Cir. 1954, 215 F. (2d) 84; *Sparks v. U.S.,* 6 Cir. 1937, 90 F. (2d) 61; *Hone Wu v. U.S.,* 7 Cir. 1932, 60 F. (2d) 189; *Chiaravaoti v. U.S.,* 6 Cir. 1932, 60 F. (2d) 192.

The present day rule applicable to criminal pleading in the Federal Courts is set forth by Justice Sutherland in *Hagner v. U.S.,* 285 U.S. 427, at page 431:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' (Cit.)"

The decided cases wherein indictments under the Obstruction of Justice statute have been attacked, almost universally exclude the requirement that specific elements of *scienter* be set out in the indictment. For example, it is held that where the charge is interference with a witness the indictment need not charge that the defendant knew that the person interfered with was to be a witness. *Seawright v. U.S.,* 6 Cir. 1955, 224 F. (2d) 482; *Parsons v. U.S.,* 5 Cir. 1951, 189 F. (2d) 252; Contra *Genna v. U.S.,* 7 Cir. 1923, 293 Fed. 387, cited by Appellant. It has also been held that under an indictment charging the impeding of officers of the Court under this statute the indictment need not set forth who were the officers to be impeded, *U.S. v.*

Polakoff, 2 Cir. 1949, 112 F. (2d) 888, or that the person impeded was a Deputy Marshal, *Sparks v. U.S., supra,* nor that the defendant knew he was such officer, *State v. Caldwell,* 14 Mass. 330. In an indictment charging obstruction of justice by destroying certain documents, it has been held that the indictment need not allege that the documents destroyed were involved in the due administration of justice, *U.S. v. Solow,* D.C. S.D.N.Y. 1956, 138 F. Supp. 812, or were material, *U.S. v. Siegel,* S.D.N.Y. 1957, 152 F. Supp. 370; and in an indictment charging obstruction of justice by filing certain false letters and affidavits, it has been held that the indictment need not allege that the letters and affidavits were false to the knowledge of the defendant, *Nye v. U.S.,* 4 Cir. 1943, 137 F. (2d) 73.

So, too, it is unnecessary to allege the jurisdiction of the Court in which justice was being obstructed, *Nye v. U.S., supra; Davey v. U.S.,* 7 Cir. 1913, 208 Fed. 237.

But most significantly it has been held unnecessary to allege knowledge of the defendant that there was a pending proceeding in Court, *Anderson v. U.S.,* 6 Cir. 1954, 215 F. (2d) 84; *Astwood v. U.S.,* 8 Cir. 1924, 1 F. (2d) 639; nor that the defendant knew that justice was being administered, *U.S. v. Solow, supra,* nor that the defendant had the intent thereby to impede justice; *Holland v. U.S.,* 5 Cir. 1957, 245 F. (2d) 341; *Astwood v. U.S., supra.* As was said in *Caldwell v. U.S.,* D.C. Cir. 1954, 218 F. (2d) 370, at page 372:

> " . . . The only intent involved in the crime is the intent to do the forbidden act. The defendant

> 'must have had knowledge of the facts, though not necessarily the law, that made' his act criminal. *Morissette v. U.S.,* 342 U.S. 246 . . . "

See also *Astwood v. U.S., supra,* 1 F. (2d) at page 642. In the *Caldwell* case the Court of Appeals also approved the following charge to the jury, stating at page 371:

> "'The court charged the jury 'as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice.' "

See also *U.S. v. Russell,* 255 U.S. 138.

As previously mentioned, an indictment under the present rules of criminal pleading and specifically an indictment under 18 U.S.C. § 1503 need only fairly apprise the defendant of the crime intended to be alleged so as to enable him to prepare his defense and to make the judgment a complete defense to a second prosecution for the same offense. *Anderson v. U.S., supra.* It has been held that an indictment under the present 18 U.S.C. § 1503 which is couched in the general language of the statute is satisfactory and that if defendant does not feel sufficiently informed he should move for a bill of particulars. *Morris v. U.S.,* 5 Cir. 1952, 128 F. (2d) 912; *U.S. v. Polakoff, supra; Nye v. U.S., supra.* In this latter case, the Court held that an Indictment charging the defendant with corruptly obstructing the administration of justice by endeavoring to have a pending action dismissed by filing

false letters and affidavits which had been fraudulently obtained, stated an offense under the statute. In answer to defendant's contentions otherwise the Court pointed out that some of the details of the offense were provided in another conspiracy count and that if the defendant felt in need of additional information in preparing his defense his remedy was a motion for a bill of particulars. Moreover the record showed that when the defendant made such a motion he was advised by the representatives of the Government that the letters and affidavits relied on were those described in the first count, and as a result, the bill of particulars was not necessary.

At the hearing on the Motion for Bill of Particulars herein, it was represented to the Court and made a part of the record and accepted by the Defendant (R. 7-9) that Count II of the Indictment was based upon the conditions of probation shown by the Court's Judgment and orders therein and the testimony at the hearing on the revocation of probation of Harriet Bruce, in Criminal No. 11,073 in the United States District Court for the District of Hawaii, and that the acts were those testified to by the Defendant and others at this hearing. (It should be noted at this point that all of the evidence which was presented with respect to Count II was specifically within the particulars stated, that is, the Court's record in the case of Harriet Bruce and the revocation of probation therein, together with the testimony of the Defendant at the revocation hearing and the testimony of one other witness there, Betty McGuire.)

So, the real question is whether or not Count II of the Indictment taken together with all of the particulars specified by the Government, which in effect summarized all the evidence which was ultimately presented with respect to Count II, charges a substantive offense under 18 U.S.C. § 1503 as will be hereinafter discussed.

It should also be pointed out that the sufficiency of Count II of the Indictment was never challenged by pre-trial motion. It has been held that this constitutes a waiver. *U.S. v. Miller,* 2 Cir. 1957, 246 F. (2d) 486, 488.

> " . . . Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."
>
> *Hagner v. U.S.,* 285 U.S. 427, 433.

II.

COUNT II OF THE INDICTMENT, SUPPLEMENTED BY THE PARTICULARS AND BORNE OUT BY THE EVIDENCE, STATES AND DEMONSTRATES AN OFFENSE UNDER 18 USC §1503.

Section 1503 of Title 18 U.S.C. provides in part that:

> "Whoever . . . corruptly or by threats or force . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The following extracts from various cases indicate the breadth of the meaning of the term "administration of justice" and the obstruction thereof as interpreted by the Courts:

"The term 'administration of justice' is a broad and comprehensive term. It means something more than the mere trial of a cause. It includes everything connected with the determination of the rights of person and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceedings and process by which such determinations are embodied in a final determination therein, according to the established law of the land."

State v. Post, 16 Oh.S.&C.P. 200, 206, 4 Oh.N.P. 157;
1 C.J. 1239 n. 73.

" . . . the administration of *justice* means the 'performance of acts or duties required by the *law* in discharge of their duty.' *Belo v. Lacy* (Tex. Civ. App.) 111 S.W. 215."

Rosner v. U.S., 2 Cir. 1926, 10 F. (2d) 675, 676.

" . . . The statute is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice . . . "

Samples v. U.S., 5 Cir. 1941, 121 F. (2d) 263, 266.

"The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper admin-

istration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. The concept of 'justice' . . . merely recognizes the inherent right of society to protect itself and its innocent members from vicious acts which imperil one of the most vital safeguards of our system of law . . . "

Catrino v. U.S., 9 Cir. 1949, 176 F. (2d) 884, 887.

There is no question but that probation constitutes one phase of the administration of justice since it is well established that it is a discretionary power vested in trial courts to be exercised upon considerations of the best interests of the public. *Kirsch v. U.S.,* 173 F. (2d) 652; *U.S. v. Durkin,* 63 F. Supp. 570. In *Roberts v. U.S.,* 320 U.S. 264, it is pointed out at Page 272 that:

" . . . the basic purpose of probation [is] to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts . . . "

Thus, although probation is a type of punishment primarily to discipline and rehabilitate the defendant, it is also based upon considerations of the public good.

The probation statute (18 U.S.C. § 3651) provides that before probation may be granted, the court must

be satisfied that the ends of justice and the best interests of the public, as well as the defendant, will be served thereby. Since the offender is under the continuing control and surveillance of the court, any act deliberately done to cause the probationer to violate the terms of the probation must necessarily be a violation of the Obstruction of Justice statute (18 U.S.C. § 1503).

In *Ryals v. U.S.,* 5 Cir. 1934, 69 F. (2d) 946, 947, the Court, in considering whether or not an assault on a Probation Officer was a contempt of court as an obstruction of justice, stated as follows:

> " . . . The probation officer is appointed by the court to serve the court and has duties fixed by law . . . He is a ministerial officer of the court, and the court has power to protect him while executing its orders and commands, whether oral or written . . . obstruction of him must be with knowledge of his official character and mission and must be willful and intentional to be a contempt of court . . . "

There are numerous cases charging offenses under the omnibus clause of the statute set forth above and as used in Count II of the Indictment herein.

An indictment charging that the defendants did corruptly endeavor to impede the due administration of justice, in that they promised a named person in consideration of a payment of money that they would alter the testimony of one defendant and of another person in a pending criminal prosecution in Federal Court stated a criminal offense under 18 U.S.C. § 1503.

Anderson v. U.S., supra. An indictment charging the defendant with corruptly endeavoring to obstruct the due administration of justice by endeavoring to influence another to obtain information from petit jurors in a specific case before return of the verdict therein was upheld in *Caldwell v. U.S., supra.*

It should be noted that neither of the foregoing cases involved direct contact either with the witness or with the juror, and this was one of the points specifically raised on appeal in the *Anderson* case. This should dispose of Appellant's contention (Br. 9) that the expressions "obstruct" and "impede" the due administration of justice as used in the statute refer only to direct acts of violence or menace disturbing the ordinary functions of the Court, in reliance of *U.S. v. Seeley,* C.C. S.D.N.Y. 1844, Fed. Case No. 16,248A.

Judge Learned Hand upheld an indictment under the omnibus clause of the statute charging a conspiracy to obstruct justice by influencing an Assistant District Attorney in his recommendations of sentence to the District Judge. *U.S. v. Polakoff, supra.*

It has been held that an indictment charging the defendant with corruptly obstructing the administration of justice by endeavoring to have a pending action dismissed by filing false letters and affidavits which had been fraudulently obtained stated an offense under the statute. *Nye v. U.S., supra.*

Although this issue was never raised, the Indictment in *Bosselman v. U.S.,* 2 Cir. 1917, 239 Fed. 82, charged

that the Defendant had corruptly influenced, obstructed, and impeded the due administration of justice by directing and requesting others to make certain erasures, changes and insertions in the books and records of a corporation material to matter under inquiry by the Grand Jury. So, too, in *Wilder v. U.S.,* 4 Cir. 1906, 143 Fed. 433, a conspiracy was charged under the omnibus clause of the statute to corruptly obstruct and impede the due administration of justice in a Court of the United States in a civil action between private parties, and this was held to be an offense under the statute.

Justice Field stated that the conduct of a witness before an examiner in chancery in being armed with a pistol and on occasion threatening to take the life of one of the counsel was an offense against the laws of the United States. He stated " . . . It interferes with the due order of proceedings in administration of justice, and is well calculated to bring them into contempt . . . " *Sharon v. Hill,* Cir. Ct. D. Calif. 1885, 24 Fed. 726, 729. In the same case Judge Sawyer stated that such conduct was an offense under the predecessor statute not only as an obstruction of an officer of the Court, but also impeding the due administration of justice. 24 Fed. at page 732.

The State Courts have held that the offense of obstructing or impeding the administration of justice may be committed by an abandonment by an attorney, in a criminal case, of his client on the day of trial in disregard of an order of the Court, simply because his fee had not been paid, *State v. Shay,* 3 Ohio N.P.,

N.S., 657, or by inducing another to bring a suit which is fraudulent and unjustified by the facts, *Melton v. Commonwealth,* 170 S.W. 37, 160 Ky. 642. 67 C.J.S. 53.

There is a great variety of cases in the reports dealing with corrupt endeavors to impede officers of the Court in one way or another. The one most analogous to this case is *People v. King,* 210 N.W. 235, 236 Mich. 405, in which it was held an offense under such a statute to induce *others* to resist officers in the execution of an ordinance.

Another case similar or analogous to the present case is *Astwood v. U.S., supra.* There the Indictment charged the Defendant with endeavoring to influence, obstruct and impede the due administration of justice in the U.S. District Court by unlawfully and corruptly attempting to induce and entice a defendant to fail and neglect to appear in answer to a charge then and there pending against her. In the instant case, the Defendant Haili induced Harriet Bruce not only by persuasion but through physical violence not to report to the Probation Officer; that he was associating with her contrary to the terms of her probation, thus preventing the Probation Officer "from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts." *Wilder v. U.S., supra,* 143 Fed. at page 441. When those facts ultimately did come to the attention of the Probation Officer, the record reflects that he filed a Motion for Revocation of Probation and as a result of this asso-

ciation of the Defendant with the Probationer, the Probationer's probation was revoked and she was sent to jail for two years. It is difficult to see where there could be a more clearcut case of obstruction of justice than has been demonstrated here.

Therefore, it would appear that although research has disclosed no other case which is identical in point of fact to the instant case, there is ample authority demonstrated in the foregoing analysis upon which this Court should properly conclude as the Trial Court did, that Count II of the Indictment herein, together with the particulars and evidence thereon, charges and involves an offense under 18 U.S.C. § 1503.

Appellant's Brief in this regard is addressed primarily to an argument of the evidence. Appellant acknowledges that "had he been told or directed by the Court or its Probation Officer not to associate with the Probationer or had he threatened the Probation Officer not to carry out the terms and conditions of probation relative to the Probationer . . . there would be no question that Appellant's conduct would have been covered by § 1503." (Br. 11.) What he is in effect saying is that there may be an offense under the statute for interfering with a probationer of the Court or with the Probation Officer, but under the facts of this case as he views them, there was no offense. It is inappropriate at this juncture to argue the evidence since the jury has found by way of its verdict of guilty that the Defendant did obstruct the due administration of justice. There is ample evidence in the record from which the jury could have so concluded, and that

is the only issue on appeal so long as the jury was properly instructed. Here follow the pertinent instructions given by the Court:

> "The essential ingredients of the offense charged in Count II are:
>
> 1. That Germaine M. Haili did corruptly, and by threats and force, influence, obstruct, and impede the due administration of justice, or endeavor to influence, obstruct, and impede the due administration of justice.
>
> 2. That Germaine M. Haili entertained an intent to impede the due administration of justice.
>
> 3. That Germaine M. Haili had knowledge that justice was being administered.
>
> "Unless these essential ingredients are proved beyond a reasonable doubt, you must acquit the defendant as to Count II of the indictment." (R. 101.)
>
> "The due administration of justice as used in the criminal statute and in count 2 includes the supervision of the terms and conditions of probation of the Court's probationers by the Court through its probation officer." (R. 103.)

In view of the foregoing analysis of the law relating to the due administration of justice and the obstruction thereof, there is no question but that these instructions were proper.

CONCLUSION.

It is respectfully submitted that the Trial Court did not err in any matter brought before it in the trial of this case and that the Judgment of that Court should be affirmed.

Dated, Honolulu, T. H.,
January 29, 1958.

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